

**Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.**

ATTORNEY FOR APPELLANT:

**L. ROSS ROWLAND**  
Muncie, Indiana

ATTORNEYS FOR APPELLEE:

**STEVE CARTER**  
Attorney General of Indiana

**MONIKA PREKOPA TALBOT**  
Deputy Attorney General  
Indianapolis, Indiana

**IN THE  
COURT OF APPEALS OF INDIANA**

SHANE CRAIG,

Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

) ) ) ) ) ) ) ) )

No. 18A02-0608-CR-641

APPEAL FROM THE DELAWARE CIRCUIT COURT  
The Honorable Robert L. Barnett, Judge  
Cause No. 18D01-9307-CF-37

**May 31, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## **Case Summary**

Shane Craig belatedly appeals his sentence for Class A felony robbery. We reverse and remand.

### **Issue**

Craig raises one issue, which we restate as whether he was properly sentenced.

### **Facts**

A week prior to June 15, 1993, nineteen-year-old Craig and three other men planned to rob David Turner. They planned to knock Turner unconscious, tape him up, leave him in his car, and take his marijuana. At this time, they discussed killing Turner, and Craig believed they agreed not to kill him. They chose to rob Turner because they did not think he would report the taking of the marijuana to the police.

On June 15, 1993, Craig and two of the other men were at a house waiting for Turner. When Turner arrived with the fourth man, Craig hit him twice with a table leg knocking him unconscious. Craig took Turner's gun, and when Turner started to get up, Craig pointed the gun at him and told him to lie down. One of the other men taped Turner's hands behind his back, and the other placed a plastic bag over Turner's head. They pushed the air out of the bag and taped it, causing Turner to suffocate and die.

To help dispose of the body the men called a friend who owned a truck. Craig cut the plastic bag off of Turner's head and placed his body in the truck. One of the men drove to the country and left Turner's body in a field. Craig drove Turner's car to an

apartment complex and parked. Craig placed the bag used to suffocate Turner under a log near the car. The men sold the ten pounds of marijuana for \$7,000.<sup>1</sup>

On July 9, 1993, the State charged Craig and the three others with Class A felony robbery. On January 13, 1994, Craig pled guilty to the charge. On February 10, 1994, the trial court held a sentencing hearing. In its written sentencing statement, the court found the following mitigating and aggravating circumstances:

Mitigating Circumstances:

1. Age of defendant, same being nineteen (19) and this being his first felony conviction.
2. Regarding character of the defendant, defendant has cooperated with law enforcement.
3. Defendant does enjoy strong family support.

Aggravating Circumstances:

1. Defendant has some history of criminal activity:
  - A. As a juvenile, three (3) offenses, although handled informally; Intimidation and Battery, Criminal Conversion, and Auto Theft.
  - B. As an adult, three (3) misdemeanor convictions; Leaving the Scene of Accident-Property Damage or Personal Injury, Illegal Consumption of Alcoholic Beverage, Illegal Possession by a Minor, and that defendant currently has a Probation Violation pending.

---

<sup>1</sup> The State suggests that they sold the marijuana for \$2,500. However at the guilty plea hearing Craig testified, "We left town with, I believe, twenty-five hundred dollars (\$2,500.00). Then we received two thousand (\$2,000.00), and another twenty-five hundred (\$2,500.00)." Tr. p. 16.

2. Defendant is in need of correctional treatment best provided by a penal facility.

A. Prior attempts at rehabilitation have failed.

B. No voluntary rehabilitation has been sought.

3. Imposition of a suspended sentence would depreciate the seriousness of the crime.

A. Facts of this offense are particularly heinous.

B. This crime required the defendant personally to confront the victim.

C. It seems that an unusual degree of care and planning went into this offense.

D. Crime committed while lying in wait.

4. Family of victim has recommended the maximum sentence.

App. pp. 57-58. The trial court concluded that the aggravating circumstances outweighed the mitigating circumstances and sentenced Craig to forty years in the Department of Correction.

On December 30, 2005, Craig petitioned for leave to file a belated notice of appeal. After a hearing, the trial court granted Craig's petition. Craig now appeals his sentence.

## Analysis

Craig argues that the trial court improperly considered the aggravating and mitigating circumstances when it sentenced him to forty years.<sup>2</sup> Sentencing decisions lie within the discretion of the trial court. Patterson v. State, 846 N.E.2d 723, 727 (Ind. Ct. App. 2006). If a trial court enhances or reduces a presumptive sentence, it must: (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulate its evaluation and balancing of the circumstances. Id.

Craig first argues that his criminal history does not support the enhancement of his sentence. As our supreme court has observed, the significance of one's criminal history as an aggravating circumstance varies based on the gravity, nature, and number of prior offenses as they relate to the current offense. Cotto v. State, 829 N.E.2d 520, 526 (Ind. 2005). By the time Craig was nineteen-years-old, he had been involved in the criminal justice system as a juvenile and an adult. Although Craig's convictions as an adult are relatively minor and not related to the current offense of robbery, the offenses were committed in 1992, close in time to the 1993 robbery. Further, Craig's juvenile history includes intimidation, battery, criminal conversion, and auto theft. Although these offenses are more remote in time, they are similar in nature to the robbery that resulted in Turner's death. Accordingly, the trial court properly considered Craig's criminal history

---

<sup>2</sup> Craig does not argue that his sentence was improperly enhanced in violation of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). Further, Craig only makes passing references to advisory sentences, equating them to the former presumptive sentences. Because the parties do not argue otherwise, we will review Craig's sentence for an abuse of discretion in accordance with the former presumptive sentencing scheme.

as an aggravating circumstance. However, because Craig’s criminal history includes only misdemeanor convictions and informally handled juvenile offenses, we conclude that his criminal history is “only marginally significant.” Id.

Craig also contends that the trial court improperly considered that he was in need of correctional treatment best provided by a penal facility. Because every executed sentence involves incarceration, there must be a specific and individualized statement explaining why extended incarceration is appropriate. Cotto, 829 N.E.2d at 524. Although the trial court considered that prior attempts at rehabilitation had failed and that Craig had not voluntarily sought rehabilitation, these considerations do not explain why extended incarceration was appropriate. Given that the record indicates Craig had never been incarcerated before, these explanations are insufficient to justify an enhanced sentence. The trial court improperly considered this as an aggravating circumstance. See id. at 525 (“Here, the trial court did not provide such a statement and consequently the use of this aggravating circumstance was improper.”).

Craig does not specifically challenge the trial court’s finding as an aggravating circumstance that the imposition of a suspended sentence would depreciate the seriousness of the crime. There is no indication, however, that the trial court ever considered a suspended or reduced sentence. Although the trial court recognized the nature of the offense in considering this as an aggravating circumstance, “[t]his factor serves only to support a refusal to impose less than the presumptive sentence and does not serve as a valid aggravating factor supporting an enhanced sentence.” Cotto, 829

N.E.2d at 524. Thus, the trial court improperly considered this as an aggravating circumstance.

Finally, the trial court considered as aggravating that Turner's family recommended that Craig receive the maximum sentence. The recommendations of a victim's family may be used to assist the trial court in making its decision, but the recommendations are not mitigating or aggravating circumstances. Hawkins v. State, 748 N.E.2d 362, 363 (Ind. 2001). The trial court improperly relied on such a recommendation as an aggravating circumstance.

Craig also suggests the trial court did not properly consider the mitigating circumstances. The finding of mitigating circumstances is within the trial court's discretion. Cotto, 829 N.E.2d at 525. A trial court need not weigh or credit the mitigating factors in the same manner as a defendant suggests; however, when a trial court fails to find a mitigator that the record clearly supports, a reasonable belief arises that the mitigator was improperly overlooked. Id.

Although Craig does not point to any specific errors in the trial court's consideration of the mitigating circumstances, we believe that Craig's guilty plea is entitled to mitigating weight in addition to the trial court's finding that Craig cooperated with law enforcement. Not only did Craig plead guilty without the benefit of a plea bargain, but he also helped investigators solve the case. Unlike many cases in which we are only left with a defendant's self-serving assertions that the trial court improperly overlooked a mitigating circumstance, here, at the sentencing hearing, the prosecutor argued:

This Defendant, in my experience both, on both sides of the Courtroom has come as close as I've ever seen a Defendant come in a major felony case, such as a Class A felony case or a Murder case of accepting responsibility for what he has, in fact, done. And I think that that is truly a mitigating circumstance in regard to whether or not he is likely to be rehabilitated in the prison system. I think that there is every, every likelihood that he would from what I've seen so far. Defense Counsel is also correct that absent his confession at the change of plea hearing, which I did not know what he was going to say prior to him saying it, Judge, we had not [sic] evidence to support a cause of death. None of the physical evidence that we had could have supported any cause of a death as in the autopsy report, and suffocation is not going to show up as a broken bone, and I think we have the accurate cause of death now which will greatly aid in other prosecutions. His cooperation with the law enforcement agencies has been complete and I think thorough, and I think that also is a mitigating circumstance.

Tr. pp 38-39.

“Our courts have long held that a defendant who pleads guilty deserves to have some mitigating weight extended to the guilty plea in return.” Cotto, 829 N.E.2d at 525.

“A guilty plea demonstrates a defendant’s acceptance of responsibility for the crime and at least partially confirms the mitigating evidence regarding his character.” Id. Based on the prosecutor’s argument, this case appears to epitomize a defendant’s acceptance of responsibility for the crime. Thus, we conclude that, in addition to his cooperation with law enforcement, Craig is entitled to mitigating weight for his guilty plea.

In sum, we have found several irregularities with the trial court’s sentencing decision. Under such circumstances, we may remand to the trial court for a clarification or new sentencing determination, affirm the sentence if the error is harmless, or reweigh



the proper aggravating and mitigating circumstances independently at the appellate level. Id. Here, we opt to reweigh the proper aggravating and mitigating circumstances.

We consider the mitigating circumstances found by the trial court: Craig's age, his cooperation with law enforcement, and his strong familial support. We also consider as a mitigating circumstance his guilty plea. We believe Craig's age and familial support are of nominal mitigating weight while his cooperation with police and guilty plea are of more significant mitigating weight.

The only proper aggravator found by the trial court is Craig's criminal history. As we have already discussed, however, this is only a marginally significant factor. Although the trial court did not specifically find the nature and circumstances of the offense to be aggravating, it clearly considered them as such when it acknowledged that a suspended sentence would depreciate the seriousness of the offense. Specifically, the trial court found that the facts of this offense are particularly heinous, Craig personally confronted the victim, an unusual degree of care and planning went into the commission of the offense, and the crime was committed while lying in wait.

We agree that the nature and circumstances of this offense are quite significant. Craig and his cohorts made detailed plans to violently rob Turner well in advance of the commission of the offense. They chose Turner because they knew he had marijuana and believed he would not report the robbery of such to the police. During their planning, the men discussed whether they would kill Turner because one of the men did not want Turner "messing with" his girlfriend after he fled town with the money from the sale of

the stolen marijuana. Tr. p. 15. Craig testified that prior to the commission of the offense, he did not believe they were going to kill Turner.

To facilitate the commission of the offense, one of the men arrived at a house where Craig and two others waited for them. When Turner arrived, Craig struck him twice with a table leg, knocking him unconscious. The two others taped Turner's hands behind his back, placed a plastic bag over his head, pushed the air out of it, and taped the bag to his head, suffocating him. Craig then helped dispose of Turner's body, car, and the bag used to suffocate Turner. The men then sold the ten pounds of marijuana that they stole from Turner for \$7,000.

In balancing the particularly egregious nature of this robbery and Craig's criminal history against the mitigating circumstances, we conclude that the aggravating circumstances outweigh the mitigating circumstances. However, given Craig's guilty plea and cooperation with the police, we believe his sentence should be enhanced by five years—or a total sentence of thirty-five years.

### **Conclusion**

The trial court improperly sentenced Craig. In reweighing the proper aggravating and mitigating circumstances at the appellate level, we reverse and remand for the imposition of a thirty-five-year sentence.

Reversed and remanded.

BAILEY, J., and VAIDIK, J., concur.